For practitioners of federal criminal law, it is sometimes the waiting that is most gut-wrenching. Waiting for a verdict, certainly, but also those few moments after a presentence investigation report arrives and before the practitioner finds the paragraph titled “Impact of Plea.” In that much-anticipated section, the probation officer assesses whether the parties correctly calculated the criminal history category, the offense conduct score and the resulting guideline range—in short, whether the plea will stand without further negotiation or argument. Unfortunately, in the Eastern District of Michigan, this paragraph carries bad news in about a third of the cases because the parties have failed to account for all of the defendant’s criminal history.

This article describes the method used to calculate criminal history, measures the inefficiency caused by the lack of accuracy in its computation, assesses its sources and suggests methods to address the problem.

I. The “Best Guesstimate” Plea Process

In the Eastern District of Michigan, Rule 11 plea agreements are initially drawn up by assistant United States Attorneys, who have no training in researching criminal history. In doing so, they rely on the reports of investigative agents, together with any information provided by the defendant, to calculate the offense conduct score. The AUSA then calculates the criminal history score, typically relying only on the Law Enforcement Information Network (LEIN) report received from an agent. If there are obvious holes in the LEIN report (most usually a “No data received” entry), the AUSA may ask an agent to fill in the information gap. The Rule 11 plea agreement almost always contains an agreed-upon guideline range, and establishes an incarceration cap. Under the language of most Rule 11s, if the judge intends to impose a sentence over the agreed-upon cap, the judge must allow the defendant to withdraw the plea and proceed to trial.

Once the Rule 11 plea agreement is drafted, it is proffered to the defendant. If the defendant accepts, a change of plea hearing is held. At the hearing, the defendant has an opportunity (sometimes at the explicit invitation of the sentencing judge) to supplement the criminal history calculation with any missing information. Only rarely does a defendant offer up omitted convictions, or does the possibility of omitted convictions get discussed.

Some weeks after the plea hearing, the presentence investigation report arrives, the prosecutor and defense attorneys instinctively flip to the back and for the first time learn whether the probation officer agrees with their calculations.

II. Inefficiencies Created

Under this system, the danger is that the parties will have failed to include all relevant criminal history, and the PSI will come back with a recommended criminal history category greater than that included in the plea agreement. The problem is most acute when the probation officer’s calculation of the criminal history category raises the guideline range above the incarceration cap in the plea agreement, raising the possibility that the defendant may withdraw the plea or the plea agreement may be rejected by the judge.

An informal survey of AUSAs in the Eastern District reveals that in about 40% of the cases, the PSI reveals prior convictions not reflected in the plea agreement. A written survey of judges in the district roughly mirrors those results. The judges were asked “Is there a difference in the Criminal History categories set forth in the Rule 11 Agreement of defendants and the Criminal History category in the Pre-Sentence Reports of the defendants?” The choices offered were “Always, Often, Seldom and Never.” Five responding Judges said “Often,” five said “Seldom” and four avoided the categories while revealing some degree of a problem.

A conflict between the parties’ agreement and the probation officer’s calculations can affect the defendant’s expectations, the workload of practitioners and judicial economy. The defendant’s expectations of what will be faced at sentencing are suddenly altered for the worse. For both parties, the plea must either be renegotiated or face rejection (provided the additional criminal history is not simply ignored). Finally, the sentence hearing may have to be adjourned while the conflict is resolved, or a conference with the judge prior to sentencing might be required. The comments of judges in response to the survey reflected these inefficiencies, though few judges described it as a “significant” problem. One judge concluded “that fewer Rule 11s would fall apart, and there would be fewer delays in sentencing once the presentence report is prepared, if the discrepancies did not exist.”

Another judge described the typical compromise: “Generally, both sides acquiesce in the revised determi-
nation by probation. By the time the presentence report is prepared, the defendant has already overcome the biggest obstacles to a guilty plea. He has by that time repeatedly admitted guilt. Usually, the plea sticks even if the sentence needs to be increased. On a rare occasion, the basic agreement is lost. Though this description minimizes the emotional impact on defendants, the expectations of the defendant are one casualty of the current system.

As the judges’ comments reflect, on a few occasions compromise is not possible. For example, if the additional criminal history results in the defendant being a “career offender” under § 4B1.1, the effect can be drastic. Similarly, one additional conviction for a crime of violence or a drug trafficking offense can result in a doubling in the guideline range. Such a “surprise” may be difficult to overcome through negotiations without resorting to transparent fictions or the abandonment of the plea itself.

III. The Roots of the Problem

The sources of the problem are no mystery: First, the actor with the least ability to discern criminal history (as between the probation officer, the defense attorney and the prosecutor) is the one called upon to fully describe that criminal history in drafting the Rule 11 plea agreement. Second, the defendant does not himself make the judge aware of his or her criminal history either because there is nothing to be gained by doing so or because the defendant honestly does not remember or understand a criminal record which may stretch back for decades.

Federal prosecutors receive no training in the retrieval of criminal history, lack the resources to properly compile such a history, do not have access to the defendant for that purpose, and generally assign to others the task of following up with even local courts to resolve discrepancies (if this is done at all). The AUSA does not even have the ability to pull up a fresh LEIN when required, and must count on the agents to do so.

Moreover, federal prosecutors (and, in some instances, the defendant’s attorney) have some built-in disincentives to spend great effort researching criminal history. If, as the judges state, most defendants go along with a higher sentence resulting from the later discovery of additional convictions, there is little to lose by unintentionally understating criminal history (and the resulting guideline score) when preparing a Rule 11. In short, some guilty pleas that otherwise would be trials probably result from the parties’ inability to properly calculate criminal history.

A second part of the problem lies with the defendant. As one senior judge noted in response to our survey, “It appears that defendants are not always candid about their histories during plea bargaining, even with their own attorneys.” Defendants have strong motivation not to be candid—there is nothing to be gained by describing one’s own prior convictions so that a higher sentence may be imposed, and there are no effective sanctions for failing to do so. But, of course, a defendant’s lack of candor gains him no advantage when the full criminal history is ultimately discovered by the probation officer.

These institutional realities which limit development of complete criminal history information run contrary to one of the fundamental goals of a system of justice: getting to the truth.

IV. Proposals

One solution is suggested by practices employed by a few judges in the Eastern District of Michigan. One judge, for example, does not allow plea agreements to establish a cap of incarceration in terms of months, and instead follows a format which states that a defendant’s sentence shall not exceed the middle or top of the range determined by the judge. This practice has so far not been adopted by other judges.

Another solution may lie in attacking the roots of the problem—the AUSA’s inability to obtain the criminal history score, and defendants’ reluctance to reveal the extent of their criminal pasts. On the side of the AUSAs, training could be provided in researching criminal history, or an investigator from the office could be charged with the task of fleshing out criminal histories. Under the present system, AUSAs are not provided with resources or incentives to prepare a complete criminal history. On the defendant’s side, sanctions could be imposed on a defendant who does not come forward with additional criminal history, and judges could more thoroughly question defendants about prior convictions at plea hearings.

Problems exist with both of these proposals: AUSAs are already swamped with new areas of responsibility, and budgets limit the hiring of investigators. Further, sanctions may be unequally applied, and may be ineffective at achieving the goal if the defendant truly does not remember or understand the import of prior court proceedings, and defense attorneys may resist pressure to play a more active role in developing criminal history.

In some federal districts, including the District of Maryland, judges sometimes order that a presentence investigation report be prepared prior to drafting a plea. The advantages are obvious: it eliminates discrepancies between information available to the parties and that known to probation officers through the diligent work they are trained to do, including the scoring of criminal history.

A problem with this procedure is its likely effect on dockets. Pleas are generally drawn up within a month after indictment or complaint. A full PSI is usually received at least a month (and sometimes two or three
months) after a conviction by plea or trial. To require a PSI before plea would add months to the period from charge to adjudication of guilt. Even if the Speedy Trial Act were waived for this period “in the interests of justice,” it would create an open-ended period of delay largely beyond the control of the court.

A modification might be more palatable—preparation of only the criminal history portion of the PSI prior to the drafting of a plea. In part, the probation officer could rely on the criminal history developed by the pre-trial services officer at the time of arrest or indictment. While the probation officer may still take a different view from the parties as to the offense level scoring (as opposed to criminal history), it is unlikely that her reasoning would be based on facts not known to the prosecutor and defense attorney.

This practice would not require any party to perform additional work, since the probation officer is already charged with determining criminal history (though at a later point). The preparation of this portion of the PSI would be triggered by the initial charge. While that would mean that a partial PSI would be drawn up for some defendants who are eventually acquitted, this inefficiency would be relatively small, at least in the Eastern District of Michigan, since the percentage of defendants who go to trial and win is a small fraction of total cases.

The present system of calculating criminal history, in the Eastern District of Michigan and in other districts employing this system, deserves attention and reform. It would benefit parties and the courts through more realistic defendant expectations, increased prosecutorial certainty and greater judicial efficiency.

Notes
1 One wrote in “sometimes,” another checked “seldom” but wrote next to the question “33% +/-,” a third simply wrote in “25%-35% of the time,” and a fourth described the situation occurring “more than [seldom], but less than often.”
2 These expectations are sometimes built on the defendant’s own failure to fully describe his or her own criminal history when given an opportunity, as discussed in the next section.
4 Under the present system, the AUSA and defendant’s attorney are allowed to view the Pretrial Services Officer’s calculation only in the courtroom during the initial appearance or arraignment—neither side is allowed to take a copy of the report with them. Even allowing the parties to obtain a copy of this preliminary report would be an improvement on the current system.